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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JOSEPH HENDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLEE'S BRIEF

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

---

I

STATEMENT OF ISSUES

Defendant's Opening Brief raises the following issues:

1. Can defendant raise the issue of whether or not his confession was obtained during a period of illegal detention for the first time in this Court?

2. Did the trial judge err in admitting into evidence defendant's confession when defendant failed to produce any evidence of unnecessary delay between his arrest and arraignment?

3. Was defendant's confession rendered



inadmissible merely because it was made prior to the time counsel was appointed to represent defendant?

4. Did the actions of the Assistant United States Attorney prejudice defendant's right to a fair trial?

5. Did the trial judge err in allowing a gun to be marked for identification outside the presence of the jury when the gun was never introduced into evidence?

6. Did the trial judge prejudice defendant's right to a fair trial by interrupting defendant's counsel's cross-examination of Government witnesses?

7. Did the trial judge prejudice defendant's right to a fair trial by interrupting defendant's counsel's direct examination of defendant?

8. Did the trial judge abuse his discretion in unreasonably limiting closing arguments?

9. Was defendant deprived of a fair trial because he was represented by incompetent counsel?

## II

### STATEMENT OF FACTS

On December 13, 1965, Joseph Henderson and Benjamin Washington were arrested at 4:01 P. M., in Hayden Corners, Alabama, by Special Agent Thomas Shaugnessy for the robbery of a bank in Los Angeles, California, on November 15, 1965



[R. T. 264, 265, 266 and 282]. <sup>1/</sup> The car in which the two men had been riding was searched [R. T. 282], and they were then taken to the Jefferson County, Alabama Jail [R. T. 289] for booking. They arrived at the jail at 5:03 P. M. [R. T. 291], and were involved in the booking procedure until 5:40 P. M. [R. T. 331]. Immediately after the booking was completed, Agent Shaugnessy talked to Mr. Henderson [R. T. 331], who admitted taking part in the robbery of the bank in Los Angeles [R. T. 268].

On December 29, 1965, an indictment charging Joseph Henderson, Benjamin Washington and Willie Lee Henderson with robbery of a national bank by use of a dangerous weapon in violation of Title 18, United States Code, Sections 2113(a) and (d), was filed in the Southern District of California, Central Division [C. T. 2]. <sup>2/</sup> Defendants Joseph Henderson and Benjamin Washington were arraigned on January 11, 1966, and counsel was appointed for each of them [R. T. 9]. On January 17, 1966, both defendants entered pleas of not guilty to the charges against them [R. T. 20]. Trial by jury commenced on February 1, 1966 before the Honorable Francis C. Whelan, United States District Judge, Central District of California [R. T. 24]. On February 4, 1966, defendants Joseph Henderson and Benjamin Washington, were found guilty [R. T. 682].

The instant appeal involves only defendant Joseph Henderson.

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<sup>1/</sup> "R. T." refers to Reporter's Transcript.

<sup>2/</sup> "C. T." refers to Clerk's Transcript.



### III

#### ARGUMENT

- A. THERE IS NO EVIDENCE OF ANY UNNECESSARY DELAY BETWEEN THE ARREST AND THE ARRAIGNMENT OF DEFENDANT AND THEREFORE THE TRIAL JUDGE DID NOT ERR IN ADMITTING DEFENDANT'S CONFESSION INTO EVIDENCE.
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1. Defendant Should Not Be Allowed to Raise the Issue of Whether or Not His Confession Was Obtained During a Period of Illegal Detention as He Did Not Raise it in the Trial Court.
- 

In his opening brief, defendant contends that the trial court erred in allowing his confession into evidence in that it was obtained during a period of illegal detention, in violation of Rule 5(a) of the Federal Rules of Criminal Procedure. Defendant's Opening Brief, 4. The Reporter's Transcript of the proceedings in the trial court below does not show that this contention was ever made in the court below. Rather, defendant's counsel, Mr. Raymond Finn, attempted to have the confession excluded on the ground that it was not free and voluntary. Cf. Mr. Finn's cross-examination of Agent Shaugnessy, R. T. 287-294, and his direct examination of defendant Henderson, R. T. 305-308. Having failed to raise this issue in the trial court, defendant should not be allowed to raise it for the first time in this Court. See United States v. Ladson, 294 F.2d 535, 538 (2 Cir. 1961), cert. denied 369 U.S. 824 (1962);



Rugendorf v. United States, 376 U.S. 528 (1963), reh. denied 377 U.S. 940 (1964); and Williams v. United States, 358 F.2d 325 (9 Cir. 1966).

2. Defendant Failed to Produce Any  
Evidence to Show that the Delay  
Between His Arrest and Arraign-  
ment Was Unnecessary.

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Even if this Court determines that defendant can raise the issue, it is the Government's contention that the trial judge did not err in admitting the confession. The Supreme Court has made it clear that not every confession which is made after an arrest but prior to arraignment before a commissioner is thereby rendered inadmissible. See McNabb v. United States, 318 U.S. 332, 346 (1942), reh. denied 319 U.S. 784 (1942) and United States v. Carignan, 342 U.S. 36, 44 (1951). On the contrary, for the confession to be rendered inadmissible it must be shown that the confession was made during a period of illegal detention resulting from a failure to carry the prisoner before a commissioner. Williams v. United States, 273 F.2d 781, 797 (9 Cir. 1960), cert. denied 362 U.S. 951 (1960). The burden is upon the defendant to show that the failure to carry the prisoner before a commissioner promptly constitutes unnecessary delay. See United States v. Walker, 176 F.2d 564, 567 (2 Cir. 1949), cert. denied 338 U.S. 891 (1949), and Joseph v. United States, 239 F.2d 524, 527 (5 Cir. 1957). See also, Barron, Federal Practice and Procedure, Vol.



Defendant failed to produce any evidence in the trial court that there was any unnecessary delay between his arrest and arraignment. In fact, the time of arraignment does not even appear in the record. Defendant merely contends that Agent Shaugnessy should have taken him (defendant), directly to a commissioner and that the commissioner probably was available at 5:03 P. M. Defendant's Opening Brief, p. 6. There is, however, absolutely no evidence that a commissioner was in fact available at the time defendant arrived at the jail for booking (5:03 P. M.) [R. T. 289], or that any commissioner maintained regular business hours after 5:00 P. M.

Contrary to defendant's contention, it is clear in this Circuit that an arresting officer does not "have to make a bee line to the Commissioner's Office". Williams, supra, 273 F.2d at 797. See also Ladson, supra, 294 F.2d at 537-538, and Rogers v. United States, 330 F.2d 535, 539 (5 Cir. 1964), cert. denied 379 U.S. 916 (1964). It is also clear that an arresting officer may "book" the arrested person prior to taking him before a commissioner. Mallory v. United States, 354 U.S. 449, 454 (1957); Ginoza v. United States, 279 F.2d 616, 620 (9 Cir. 1960), and Muldrow v. United States, 291 F.2d 903, 906 (9 Cir. 1960). Further, an arresting officer is not required to take an arrested person to a commissioner except during the commissioner's regular office hours. Symons v. United States, 178 F.2d 615, 621 (9 Cir. 1949), cert. denied 339 U.S. 985 (1950); Scherk v.



United States, 242 F. Supp. 445 (D.C. N.D. Cal. 1965), aff'd 354 F.2d 239 (9 Cir. 1965), cert. denied 382 U.S. 882 (1965); and United States v. Price, 345 F.2d 256, 262 (2 Cir. 1965), cert. denied 382 U.S. 949 (1965).

The record shows that defendant never alleged in the trial court that his confession was obtained during a period of illegal detention and never introduced any evidence to show that the delay between his arrest and arraignment was unnecessary. Based on this record, the trial judge did not err in admitting defendant's confession into evidence.

B.        DEFENDANT'S CONFESSION WAS  
             NOT RENDERED INADMISSIBLE  
             MERELY BECAUSE IT WAS MADE  
             PRIOR TO THE APPOINTMENT OF  
             COUNSEL.

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Defendant apparently contends that his confession was inadmissible because it was obtained at a time when he was not represented by counsel. The Government does not dispute the fact that defendant was not represented by counsel at the time he made the confession; however, it is the Government's position that the confession was admissible in that defendant knowingly waived his right to counsel.

Agent Shaugnessy testified that he informed defendant of his rights prior to talking to him (defendant) [R. T. 267-268, 287-288 and 325-326-7]. According to Agent Shaugnessy:

"At the outset I advised Mr. Henderson



that he did not have to make any statement to me, any statement he did make could later be used against him in a court of law.

"I further advised him of his right to consult an attorney or anyone else before making any statement, and if he could not hire an attorney the judge would furnish one for him." [R. T. 267-268].

Agent Shaugnessy further testified that defendant said that he (defendant), understood his rights [R. T. 288 and 326], and then voluntarily confessed to the robbery [R. T. 288, 291-292 and 326].

Defendant admitted that Agent Shaugnessy had informed him of his rights prior to talking to him [R. T. 307]. Defendant denied, however, that Agent Shaugnessy had informed him of his right to a lawyer [R. T. 307], or that he had made the statements attributed to him [R. T. 308].

In ruling that defendant had been advised of his constitutional rights [R. T. 380], the trial judge indicated that he chose to believe Agent Shaugnessy and to disbelieve defendant. Such a ruling merely involves a determination of the credibility of witnesses and, as it is a matter for the trier of facts -- in this instance the trial judge -- to decide, is not normally subject to attack upon appeal. See Bloom v. United States, 272 F.2d 515, 223 (9 Cir. 1959), cert. denied 363 U.S. 803 (1960).

Viewing the evidence in this case in the light most favorable to the Government, as this Court must, Noto v. United States,



67 U.S. 290, 296 (1961), and Redmon v. United States, 355 F.2d 407, 411 (9 Cir. 1966), it is clear that defendant was adequately advised of his rights. Nothing in the rationale of the Escobedo v. Illinois decision, 2a/ 378 U.S. 478 (1964), or the Miranda v. Arizona decision, 3/ 384 U.S. 436 (1966), renders defendant's confession inadmissible. To the contrary, defendant received all the warnings guaranteed by the Miranda decision, 384 U.S. at 479. As United States v. Slaughter, 366 F.2d 833 (4 Cir. 1966), which defendant relies upon, clearly recognizes the right to counsel may be waived. 366 F.2d at 840. In the instant case, having been advised of his right to counsel, defendant knowingly, intelligently and voluntarily waived that right. Under these circumstances, the trial judge did not err in admitting his confession.

C. THE ACTIONS OF THE ASSISTANT  
UNITED STATES ATTORNEY DID  
NOT PREJUDICE DEFENDANT'S  
RIGHT TO A FAIR TRIAL.

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Defendant in his opening brief cites three instances of alleged misconduct by the Assistant United States Attorney which he contends prejudiced the jury and deprived him of a fair trial.

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a/ The case itself is not applicable to the instant case in that nowhere in the instant record is there any indication that defendant ever requested to see an attorney.

/ The Miranda decision was rendered subsequent to trial in the instant case and therefore it is not controlling. Johnson v. State of New Jersey, 384 U.S. 719 (1966), reh. denied 385 U.S. 890 (1966).



Defendant's Opening Brief, 10-15. Two of the instances of the alleged misconduct involve the displaying and having marked for identification a gun, and the third involves conversation with a juror who was subsequently replaced.

Prior to the commencement of the trial of this case, the Assistant exhibited a gun in such a manner that it was apparently visible to the jury panel [R. T. 25]. Sometime thereafter, but also prior to the commencement of the trial, the gun was put in the clerk's desk [R. T. 24-25]. When Mr. Finn informed the trial judge that the jury panel had seen the gun [R. T. 25], the following colloquy took place:

"THE COURT: . . . we will impanel the jury and I will ask them if the fact that if any of them has seen the gun it would affect their consideration of the case, if it should appear that the gun does not come into evidence.

"THE COURT: . . . what is your attitude?

"MR. FINN: I would rather that you did not question them about the gun on voir dire, Your Honor.

"THE COURT: That is what I am talking about.

"MR. FINN: Yes.

"THE COURT: Very well." [R. T. 26-27]



The second alleged instance of misconduct occurred outside the presence of the jury [R. T. 316-321]. The Assistant made an offer of proof concerning the admissibility of the gun [R. T. 272-274]. A discussion concerning the admissibility of the gun was then held. At the conclusion of this discussion, the Assistant announced that he would not go into the matter of the gun [R. T. 320]. There is nothing in the record to indicate that he did not honor that position.

The Government respectfully submits that the Assistant's conduct in respect to the gun did not prejudice defendant. If the mere exhibiting of the gun in front of the jury panel had in fact prejudiced any of the jurors, that could have been determined by questioning the jurors. But, defendant's counsel objected to the trial judge's going into the matter [R. T. 27]. There is no evidence that the jury ever saw the gun again. To the contrary, it can be inferred that when Mr. Finn stated in his closing argument "They [the Government] talked about guns. There have been no guns produced at this trial," [R. T. 595] that the gun was not, and had not been, visible to the jury. Further, the attempt by the Assistant to lay a foundation for having the gun admitted into evidence, outside the presence of the jury, clearly could not possibly have prejudiced the jury, who never knew that the attempt had been made against defendant.

Turning to the third instance of alleged misconduct, the Assistant spoke to one of the jurors during a noon recess on the first day of the trial [R. T. 73]. He then called the trial judge's



attention to the situation before the jury returned and the juror, Mrs. Gurney, was replaced by the alternate [R. T. 73, 76 and 87].

Even though the juror that spoke to the Assistant was removed, defendant appears to contend that the conversation between Mrs. Gurney and the Assistant prejudiced the jury against him. The Reporter's Transcript shows that the trial judge brought the jurors in and questioned each of them before deciding to proceed with the case. The judge asked the jurors the following questions:

" . . . if the Court should feel it incumbent upon it to withdraw Mrs. Gurney as a juror would that in any way affect your consideration of this case?"

. . . . .

"And you feel that you would be able to render a fair and impartial verdict?" [R. T. 83].

Each of the jurors stated that the withdrawal of Mrs. Gurney would not affect their consideration of the case and that they could render a fair and impartial verdict [R. T. 83-87]. Only after he had such an assurance, did the trial judge proceed with the trial.



There is no evidence to indicate that the jurors were untruthful when they answered the trial judge's questions. Rather it must be presumed that the jurors answered the questions truthfully and that they faithfully performed their official duty. Canvess v. United States, 187 F.2d 719, 723 (9 Cir. 1951), cert. denied 341 U.S. 951 (1951). The Government respectfully submits that in this instance there was no prejudice to defendant. Cf. United States v. Kompinski, 373 F.2d 429, 432 (2 Cir. 1967).



D. THE TRIAL JUDGE DID NOT ERR  
IN ALLOWING A GUN TO BE  
MARKED FOR IDENTIFICATION  
OUTSIDE THE PRESENCE OF THE  
JURY.

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Defendant's contention apparently is that the trial judge erred as a matter of law in allowing the gun to be marked for identification. Defendant's Opening Brief, 12-13. The Reporter's Transcript shows that the gun was marked outside the presence of the jury [R. T. 321], and there is no evidence that the fact that the gun had been marked for identification was ever brought to the attention of the jury. There is no showing that the trial judge's action prejudiced defendant. Cf. Campbell v. United States, 68 F.2d 521, 523 (10 Cir. 1966). Clearly, under these circumstances, there is no basis in fact to support defendant's contention that it was error merely to permit the gun to be marked.

E. THE TRIAL JUDGE'S INTERRUPTIONS  
OF MR. FINN'S CROSS-EXAMINATION  
OF THE GOVERNMENT WITNESSES  
DID NOT PREJUDICE DEFENDANT'S  
RIGHT TO A FAIR TRIAL.

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Defendant lists approximately sixteen instances where the trial judge allegedly interrupted Mr. Finn's cross-examination of the Government's witnesses to the prejudice of defendant. Defendant's Opening Brief, 15. While the Reporter's Transcript does show interruptions by the trial judge, it also clearly shows that the interruptions did not disrupt or affect Mr. Finn's cross-



examination of the witnesses.

Defendant apparently contends that the interruptions were prejudicial no matter what the purpose or content of the interruptions. For example, defendant cites page 247 of the Reporter's Transcript as containing two instances of interruptions by the trial judge. Defendant's Opening Brief, 15 (line 21). In fact, the following colloquy appears on page 247:

"MR. FINN: Will you please step to the diagram?

"Q. Do you understand the diagram?

"A. Well, if this is the lobby here, then this is the --

"THE COURT: Speak up more loudly, because the jury can't hear you. Turn more towards the jury. Turn your back this way.

"By MR. FINN:

"Q. Will you please indicate approximately on that diagram where Betty Anderson was at the time of the robbery?

"A. She was here.

"THE COURT: She has already testified concerning the location. Do you want her to -- this thing is beginning to have so many marks on it -- you can have her place a mark on it.

"By MR. FINN:

"Q. Would you indicate that again please?

"A. Here.



"Q. Indicating the mark with the arrow leading to 'D-2. '

"A. Do you want me to draw a line?

"Q. No. I am just stating this for the record."

Clearly, Mr. Finn's cross-examination of this witness was not adversely affected by the trial judge's two interruptions. The Government respectfully submits that the other instances of interruptions likewise fail to show any disruption of Mr. Finn's cross-examination of the witnesses. There is absolutely no showing of prejudice to defendant.

F. THE TRIAL JUDGE'S INTERRUPTIONS OF MR. FINN'S DIRECT EXAMINATION OF DEFENDANT DID NOT PREJUDICE DEFENDANT'S RIGHT TO A FAIR TRIAL.

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Defendant lists approximately sixteen instances where the trial judge allegedly interrupted Mr. Finn's direct examination of defendant to the prejudice of defendant. Defendant's Opening Brief, 16. The instances cited by defendant, however, fail to show that the interruptions affected defendant's presentation of his side of the case. The Government respectfully submits that there is a total absence of any indication that the trial judge's interruptions disrupted Mr. Finn's direct examination of defendant or that defendant was hindered in any way in his efforts to get his version of the facts before the jury.



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"A. Do you want me to draw a line?

"Q. No. I am just stating this for the record."

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F. THE TRIAL JUDGE'S INTERRUPTIONS OF  
MR. FINN'S DIRECT EXAMINATION OF  
DEFENDANT DID NOT PREJUDICE DEFEN-  
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Defendant lists approximately sixteen instances where the trial judge allegedly interrupted Mr. Finn's direct examination of defendant to the prejudice of defendant. Defendant's Opening Brief, 16. The instances cited by defendant, however, fail to show that the interruptions affected defendant's presentation of his side of the case. The Government respectfully submits that there is a total absence of any indication that the trial judge's interruptions disrupted Mr. Finn's direct examination of defendant or that defendant was hindered in any way in his efforts to get his version of the facts before the jury.



G. THE TRIAL JUDGE DID NOT ABUSE  
HIS DISCRETION IN UNREASONABLY  
LIMITING CLOSING ARGUMENTS.

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Defendant contends that the trial judge unduly restricted his and co-defendant's closing arguments. Defendant's Opening Brief, 16. As a matter of law, the rule that a trial judge may, in his discretion, limit the amount of time for argument is well settled. See Barnard v. United States, 342 F.2d 309, 320 (9 Cir. 1965), cert. denied, 382 U.S. 948 (1965), reh. denied, 382 U.S. 1002 (1966) and United States v. Mills, 366 F.2d 512, 515 (6 Cir. 1966).

In the instant case, the trial below lasted slightly more than three calendar days. [R.T. 24, 548 and 582.]<sup>4/</sup> Only twelve witnesses, including defendant and his co-defendant, were called. The Government's case, primarily, consisted of the testimony of five employees of the bank who identified the two defendants as being the robbers, the testimony of Agent Shaugnessy who related defendant's confession to the jury and the testimony of Willie Lee Henderson, the third participant in the robbery. Defendant and the co-defendant both offered testimony that they were at some place other than the bank at the time the robbery occurred. Therefore, the defenses of the two defendants were

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<sup>4/</sup> As the Reporter's Transcript shows, only a minority of the calendar time was spent in actual trial of the case before the jury. According to the trial judge's calculations, only about five and a half hours of the first two days were actually spent trying the case before the jury. [R.T. 372-373.]



the same and the only issue before the jury was the credibility of the various witnesses. On Wednesday, before the trial ended on Friday, the trial judge indicated to Mr. Finn and Mr. McCament, counsel for co-defendant Washington, that he was considering limiting the defendants' closing argument to one hour. [R. T. 372.] At that time, Mr. Finn had stated that he did not anticipate that his argument would take longer than a half hour. [R. T. 372.] Mr. Finn, in fact, used only twenty-seven minutes in his closing argument on behalf of defendant. [Cf. R. T. 434 and 606.] There is no evidence that Mr. Finn, at the conclusion of his argument, requested additional time. The Government respectfully submits, therefore, that, on this record, the trial judge did not abuse his discretion in unreasonably limiting Mr. Finn's closing argument. 5 /

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5 / The Government also submits that defendant was not prejudiced by the trial judge's limitation on the amount of time that Mr. McCament was allowed to argue on behalf of co-defendant Washington. Mr. McCament requested "an hour maximum" [R. T. 434], and he was ultimately allowed approximately fifty minutes. [Cf. R. T. 634, 638 and 639] When this factor is considered along with the factors mentioned above, i. e., the shortness of the trial, the limited number of witnesses, the similarity of the defenses, and the limited number of issues involved, it is clear that the trial judge did not abuse his discretion in unreasonably limiting Mr. McCament's closing arguments.



H. DEFENDANT WAS EFFECTIVELY  
REPRESENTED BY COMPETENT  
COUNSEL.

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Defendant contends that Mr. Finn did not effectively represent him in the trial below. According to defendant, Mr. Finn's ineffectiveness was partially due to the fact that he (Mr. Finn), did not have sufficient time to prepare the case prior to the start of the trial. It is the Government's position that, aside from the issue of whether Mr. Finn was adequately prepared at the commencement of the trial, the trial judge did not err in commencing the trial three weeks after the date of arraignment. The record does not show that Mr. Finn, or Mr. McCament, ever requested a continuance. To the contrary, the Reporter's Transcript shows that when the trial judge proposed the trial date—<sup>6</sup>/ both stated that the date was agreeable with them. [R. T. 20.]

Defendant contends that he was deprived of the effective assistance of counsel because Mr. Finn was not prepared for trial and, after the commencement of trial, was overshadowed by co-counsel, Mr. McCament. Defendant's Opening Brief, 17-21. The Government respectfully submits that the Reporter's Transcript shows that both contentions are without merit.

Defendant cites Mr. Finn's failure to move to suppress,

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<sup>6</sup>/ The trial actually started one day later than the date originally proposed by the trial judge. [Cf., R. T. 20 and 24.]



prior to the commencement of the trial, a gun seized from the defendants at the time of their arrest, and his inability to respond to three questions propounded by the trial judge as evidence of Mr. Finn's lack of preparation. Defendant's Opening Brief, 18-19. All the cited instances concern the question of the admissibility of the gun and, as the Government has previously pointed out, the gun was never introduced into evidence and, in fact, the only effort to introduce the gun was made outside the presence of the jury. [R. T. 273-274 and 320-321.] Therefore, Mr. Finn's failure to move to suppress or to answer the questions<sup>7 /</sup> could not have prejudiced defendant in any way. In addition, there is no evidence to suggest that Mr. Finn was not adequately prepared at the start of the trial. Contrary to Kyle v. United States, 263 F.2d 657 (9 Cir. 1959), there is no evidence that Mr. Finn was unaware of any material evidence or that he did not communicate with defendant. Rather, the Reporter's Transcript indicates that Mr. Finn was aware of the Government's theory of the case and that he put on the only defense that was available to him.

As a second basis for his contention that he was deprived of the effective assistance of counsel, defendant alleges that Mr. Finn's representation was inadequate because he (Mr. Finn),

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<sup>7 /</sup> Mr. Finn was not alone in being unable to answer the questions propounded by the trial judge. Mr. McCament was not able to answer any of the questions [R. T. 278, 284 and 285], and the Assistant was unable to answer the single question propounded to him. [R. T. 278.]



was overshadowed by Mr. McCament "and the whole of the defense effort and strategy seemed to be dictated by the efforts made on behalf of defendant Washington." Defendant's Opening Brief, 20. Of the five bank employees who testified, only two were able to identify defendant as being one of the robbers.<sup>8/</sup> Therefore, Mr. Finn's cross-examination of the bank employees was obviously less extensive than Mr. McCament's. However, defense cross-examination of Agent Shaugnessy was conducted almost exclusively by Mr. Finn [Cf. R. T. 331-342 and 342-343], and defense cross-examination of Willie Lee Henderson was almost equally divided between Mr. Finn and Mr. McCament [Cf. R. T. 362-366, 380-392 and 392-407]. The Government respectfully submits that there is absolutely no evidence to suggest that Mr. Finn abdicated his responsibility of representing defendant to the best of his ability.

This Court has repeatedly held that the standard to be applied in evaluating the adequacy of trial counsel is that the counsel's performance must be so incompetent as to make the trial "a farce or a mockery of justice." Rivera v. United States, 318 F.2d 606, 608 (9 Cir. 1963), and Grove v. Wilson, 368 F.2d 414, 416 (9 Cir. 1966), and cases cited therein. The proceedings in the court below were far from being a "farce" or a "mockery of justice." The Government respectfully submits that the Reporter's Transcript shows that Mr. Finn ably represented defendant.

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<sup>8/</sup> The direct testimony of the two witnesses appears on pages 125-140 and 236-245 of the Reporter's Transcript; Mr. Finn's cross-examination appears on page 140-146 and 245-251.



## CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the trial court should be affirmed.

Respectfully submitted.

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